May 26, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of Docket No. 52-016

Calvert Cliffs-3 Nuclear Power Plant
Combined Construction and License Application

JOINT INTERVENORS' REPLY BRIEF REGARDING DECOMMISSIONING FUNDING QUESTIONS RAISED IN LBP-09-04

I. INTRODUCTION

There is no dispute among the parties that in 2007, the U.S. Nuclear Regulatory Commission ("NRC") revised its decommissioning funding regulations at 10 C.F.R. §§ 50.75(b)(1) and (b)(4) to allow combined license ("COL") applicants to postpone the submission of an executed surety instrument until 30 days after publication of notice in the Federal Register regarding the initial loading of fuel into the licensed reactor. But UniStar and the NRC Staff would expand the scope of postponed decommissioning funding requirements to also include the submission of any information about the applicant's choice of decommissioning funding mechanisms or whether the applicant satisfies any financial test that may be applicable to the choice of decommissioning funding mechanisms. According to UniStar and the Staff, the "reasonable assurance" test for issuance of a COL, as set forth in 10 C.F.R. §§ 50.33(k)(1) and 50.75, can be met by submitting a decommissioning cost estimate and a certification that financial assurance for decommissioning will be provided *after* licensing. NRC Staff's Brief on Decommissioning Funding Assurance at 4-6 (May 15, 2009) ("NRC Staff Brief"); Applicants' Brief on Contention 2 at 5-6 (May 15, 2009) ("UniStar Brief"). Their arguments are

contradicted by both the plain language and the history of the decommissioning funding regulations.

II. ARGUMENT: NEITHER THE PLAIN LANGUAGE NOR THE HISTORY OF THE DECOMMISSIONING FUNDING REGULATIONS SUPPORTS UNISTAR'S AND THE STAFF'S ARGUMENT THAT INFORMATION REGARDING THE DECOMMISSIONING FUNDING MECHANISM IS NOT REQUIRED AT THE TIME OF LICENSING.

UniStar and the Staff make an overarching argument that, for COL applicants, decommissioning funding is a post-licensing issue rather than a licensing issue. As stated by UniStar, "the decommissioning funding obligation does not 'ripen' until the plant begins operation." UniStar Brief at 8.[1] *See also* NRC Brief at 6. Therefore, in their view, no factual information about an applicant's plans for the funding of decommissioning costs must be submitted at the initial licensing stage, other than a decommissioning cost estimate.

In making this argument, the NRC Staff and UniStar ignore the plain language of 10 C.F.R. §§ 50.33(k)(1) and 50.75(a), which require a COL applicant to demonstrate "how" it will provide "reasonable assurance . . . that funds will be available to decommission the facility." A certification "that" the applicant will provide a reasonable assurance of decommissioning funding cannot reasonably be equated with a statement of "how" that reasonable assurance will be provided. UniStar and the Staff fail to show that the Commission made any changes to these requirements when it promulgated the new Part 52 regulations in 2007. To the contrary, instead

[1] While UniStar puts the word "ripen" in quotation marks, it offers no citation to indicate the word is used by the NRC in any regulation or rulemaking document related to decommissioning funding. Instead, UniStar relies for its own choice of the word "ripen" on the differences in the requirements for Part 50 construction permit applications and Part 50 operating license applications with respect to decommissioning funding. UniStar Brief at 8 n.7. According to UniStar, "the timing of the affirmative demonstration of decommissioning funding is linked to post-construction activities." *Id.* In fact, however, the timing of the affirmative demonstration of decommissioning funding for Part 50 applicants is linked to the issuance of the operating license, which happens relatively soon after construction is completed.

of revising 10 C.F.R. §§ 50.33(k)(1) or 50.75(a), the Commission re-published §§ 50.33(k)(1) and 50.75(a), adding only the clarification that the regulations would apply to Part 52 applicants as well as Part 50 applicants.

The history of the Part 50 decommissioning funding regulations also contradicts UniStar's and the Staff's argument that decommissioning funding is a post-licensing issue. In the 1985 proposed decommissioning funding regulations, the Commission clearly explained its intent to require the submission of sufficient factual "information," at the initial licensing stage, to permit an objective determination of a reasonable assurance that adequate decommissioning funding will be available at the time of license termination:

> Preliminary planning at the licensing stage and over facility life is important to ensure that decommissioning can be accomplished safely. *Information on funding methods* for providing financial assurance for decommissioning will be submitted with applications for new licenses for production and utilization facilities. . . . *This information* will consist of a cost estimate for decommissioning either as prescribed in the regulations or as estimated by the applicant or licensee *and a description of the method of assuring funds for decommissioning.*

Proposed Rule, Decommissioning Criteria for Nuclear Facilities, 50 Fed. Reg. 5,600, 5,601 (Feb. 11, 1985) (emphasis added). Thus, in the 1988 final rule, the Commission required that both regulated electric utility applicants and unregulated non-electric utility applicants must provide information about their choice of decommissioning funding mechanisms.[2] UniStar and the Staff

---

[2] Section 50.75(b) and (d) set forth the following requirements for electric utility applicants and non-electric utility applicants:

> (b) Each electric utility applicant for or holder of an operating license for a production or utilization facility . . . shall submit a decommissioning report, as required by § 50.33((k)(1) of this part containing a certification that financial assurance for decommissioning will be provided in an amount which may be more but not less than the amount stated in the table of paragraph (c)(1) of this section, by one or more of the methods described in paragraph (e) of this section as acceptable to the Commission. The amount stated in the applicant's or licensee's certification may be based on a cost estimate for decommissioning the facility. As part of the certification, a copy of the

point to no subsequent rulemaking history repudiating the requirement that "information on funding methods" must be submitted at the time of licensing.

In fact, as effectively conceded by the Staff, the *only* way in which the 2007 changes to 10 C.F.R. § 50.75 altered the type of "information" that must be submitted in a decommissioning funding report was to excuse combined license applicants from submitting an executed surety instrument until after licensing. *See* NRC Staff Brief at 7 (citing 72 Fed. Reg. 49,352, 49,406 (Aug. 28, 2007) for the proposition that "the NRC revised 10 C.F.R. § 50.75 to require that a combined license applicant submit a decommissioning report as required by Section 50.33(k), *but the NRC did not require the applicant to obtain a financial instrument* to fund decommissioning or to submit a copy of that instrument to the NRC.") (emphasis added).

While the Staff claims to find support in other language from the history of the 2007 rulemaking for its position that no information about decommissioning funding mechanisms need be submitted until after licensing, in fact it contradicts the Staff's position. For instance, the Staff relies on a statement by the Commission that its objective in requiring post-licensing decommissioning for COLs was to allow "'sufficient time to evaluate the projected costs of decommissioning, and any licensee-proposed changes in the financial assurance mechanism for

---

> financial instrument obtained to satisfy the requirements of paragraph (e) of this section is to be submitted to NRC.
>
> * * *
>
> (d) Each non-electric utility applicant for or holder of an operating license for a production or utilization facility shall submit a decommissioning report as required by § 50.33(k)(1) of this part containing a cost estimate for decommissioning the facility, an indication of which method or methods described in paragraph (e) of this section as acceptable to the Commission will be used to provide funds for decommissioning, and a description of the means of adjusting the cost estimate and associated funding level periodically over the life of the facility.

53 Fed. Reg. 24,018 (June 27, 1988).

funding before fuel is loaded into the reactor and operation commences.'" NRC Staff Brief at 8 (quoting 72 Fed. Reg. at 49,407). By stating that it will evaluate any "licensee-proposed *changes* in the financial assurance mechanism for funding," however, the Commission made clear its expectation that at the time these post-license reports are submitted, the applicant will have already reported to the NRC on its financial mechanism for funding. If an applicant were allowed to wait until just before loading fuel to report for the first time on its funding mechanism, there would be nothing to "change."

UniStar and the Staff also argue that interpreting the regulations to require COL applicants to submit information about decommissioning funding mechanisms would be unreasonable because it would constitute a "speculative exercise" (UniStar Brief at 9) or "waste the NRC Staff's limited resources and serve no useful purpose." NRC Staff Brief at 12. But one of the stated purposes of the decommissioning funding regulation is to require "[p]reliminary planning at the licensing stage." 50 Fed. Reg. at 5,601. UniStar and the Staff fail to provide any convincing reason why it is unreasonable to engage in such planning at the licensing stage. More importantly, they fail to explain how it could be lawful or practical for the NRC to conduct a review of whether a COL applicant complies with the licensing requirements of 10 C.F.R. § 50.75(b)(3) as a retrospective exercise to be carried out *after* the license has issued. Finally, they completely overlook the fact that the entire regulatory scheme for decommissioning funding contemplates that decommissioning funding mechanisms and cost estimates may change over time, and therefore must be updated at regular intervals. *See, e.g.*, 10 C.F.R. §§ 50.75(b)(2), 50.75(e)(3), 50.75(f)(1).

III. CONCLUSION

For the foregoing reasons, the ASLB correctly interpreted NRC decommissioning funding requirements when it partially admitted Joint Intervenors' Contention #2.

Respectfully submitted,

Electronically signed by
Diane Curran
Matthew D. Fraser
Harmon, Curran, Spielberg & Eisenberg, L.L.P.
1726 M St. NW, Suite 600
Washington, D.C. 20036
T: 202/328-3500
F: 202/328-6918

May 26, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of — Docket No. 52-016

Calvert Cliffs-3 Nuclear Power Plant
Combined Construction and License Application

CERTIFICATE OF SERVICE

I hereby certify that copies of "Joint Intervenors' Reply Brief," dated May 26, 2009, were served on the following persons by Electronic Information Exchange on May 26, 2009:

Administrative Judge
Ronald M. Spritzer, Chair
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: rms4@nrc.gov

Administrative Judge
Gary S. Arnold
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: gxa1@nrc.gov

Administrative Judge
William W. Sager
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: wws1@nrc.gov

Office of Commission Appellate Adjudication
Mail Stop O-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail:OCAAmail@nrc.gov

Office of the Secretary
ATTN: Docketing and Service
Mail Stop: O-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: HEARINGDOCKET@nrc.gov

James P. Biggins
Susan H. Vrahoretis
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
E-mail: James.Biggins@nrc.gov
E-mail: Susan.Vrahoretis@nrc.gov

Carey W. Fleming, Esq.
UniStar Nuclear Energy, LLC
750 E. Pratt Street
Baltimore, MD 21202
E-mail: Carey.Fleming@constellation.com

David A. Repka, Esq.
Tyson R. Smith, Esq.
Emily J. Duncan, Esq.
Winston & Strawn LLP
1700 K St. NW
Washington, DC 20006
E-mail: drepka@winston.com
E-mail: trsmith@winston.com
E-mail: ejduncan@winston.com

Brent A. Bolea, Assistant Attorney General
M. Brent Hare, Assistant Attorney General
State of Maryland
Office of the Attorney General
Maryland Energy Administration and
Power Plant Research Program of the
Department of Natural Resources
1623 Forest Drive, Suite 300
Annapolis, Maryland 21403
E-mail: BBolea@energy.state.md.us
E-mail: bhare@energy.state.md.us

Electronically signed by
Diane Curran
Matthew D. Fraser
Harmon, Curran, Spielberg & Eisenberg, L.L.P.
1726 M St. NW, Suite 600
Washington, D.C. 20036
T: 202/328-3500
F: 202/328-6918

May 26, 2009